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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 PATRICK STANLEY PAWLICKI,  
12 Petitioner,  
13 v.  
14 DANIEL PARAMO, Warden,  
15 Respondent.  
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Case No.: 16-cv-0721-AJB-MDD

**ORDER:**

**(1) ADOPTING REPORT AND  
RECOMMENDATION;**

**(2) OVERRULING PETITIONER'S  
OBJECTIONS;**

**(3) DENYING PETITION FOR WRIT  
OF HABEAS CORPUS;**

**(4) DECLINING TO ISSUE A  
CERTIFICATE OF  
APPEALABILITY; AND**

**(4) DISMISSING AS MOOT  
PETITIONER'S MOTION FOR  
LEAVE TO EXHAUST CLAIMS**

(Doc. Nos. 34, 60, 61, 63)

1 Before the Court is Magistrate Judge Dembin's Report and Recommendation  
2 ("R&R") on Petitioner Patrick Stanley Pawlicki's ("Pawlicki") second amended petition  
3 for a writ of habeas corpus. (Doc. Nos. 34, 60.) The R&R recommends that this Court deny  
4 Pawlicki's habeas petition for two main reasons: (1) the state court adjudication of claims  
5 one, six, and seven is neither contrary to, nor involves an unreasonable application of,  
6 clearly established federal law, and is not based on an unreasonable determination of the  
7 facts; and (2) the remaining claims fail under de novo review. (Doc. No. 60 at 3.) Pawlicki  
8 filed a fifty-nine page objection in response. (Doc. No. 61.) For the reasons discussed  
9 herein, the Court **ADOPTS** the R&R in its entirety, (Doc. No. 60), **OVERRULES**  
10 Pawlicki's objections, (Doc. No. 61), **DISMISSES** Pawlicki's habeas petition, (Doc. No.  
11 34), and **DENIES AS MOOT** Pawlicki's motion for leave to exhaust claims, (Doc. No.  
12 63).

## 13 14 I. BACKGROUND

15 The factual and procedural background of the instant matter is not only lengthy, but  
16 also incredibly intricate. Thus, instead of restating the exhaustive factual summary from  
17 the appellate court opinion affirming Pawlicki's conviction on direct review, the Court will  
18 only provide a narrow background of the vital facts pertaining to this Order.

19 On October 28, 2009, a complaint was filed in the San Diego County Superior Court  
20 charging Pawlicki with nine counts of committing a lewd act on a child under fourteen  
21 years of age in violation of California Penal Code § 288(a). (Doc. No. 51-1 at 17–23.)  
22 Shortly thereafter, Pawlicki appeared with retained counsel Kerry Armstrong and was  
23 released on a one million dollar bail bond. (Doc. No. 51-7 at 5.) Pawlicki was then  
24 arraigned on December 10, 2009, and a trial date was set for June 15, 2010. (*Id.* at 11, 13.)

25 On April 1, 2010, the court granted Pawlicki's request to substitute newly retained  
26 counsel Thomas Matthews for Armstrong and a second trial date was set for October 5,  
27 2010. (*Id.* at 14.) A couple of months later, Matthews moved to be relieved of counsel on  
28 the basis that Pawlicki said he had hired a new attorney. (Doc. No. 51-12 at 12–13.) In

1 addition, Matthews informed the court that Pawlicki had tried to extort him by claiming  
2 that he had secretly recorded conversations with his legal assistant that contained  
3 “potentially serious charges of misconduct,” and would refrain from contacting authorities  
4 if Matthews refunded his retainer. (*Id.* at 8.)

5 On August 20, 2010, counsel Demosthenes Lorandos was allowed to replace  
6 Matthews as retained counsel. (Doc. No. 51-16 at 11–21.) However, after granting this  
7 motion, the court stated that it had gotten the “slightest sense that this matter [was] being  
8 delayed by substituting attorneys any time [Pawlicki was] unhappy with whatever his  
9 attorneys [were] telling him.” (*Id.* at 8.) Pawlicki denied changing counsel to obtain delays,  
10 however, the court responded with:

11 Frankly, I don’t believe you. I think you are manipulating the  
12 system. You are trying to obtain a delay in the trial of charges  
13 that could land you in prison for life. The understanding is going  
14 to be that you are going to have a new lawyer here on that next  
date or you’re going to represent yourself.

15 (*Id.* at 13.)

16 On September 8, 2010, Lorandos appeared as retained counsel of record, asked for  
17 and was granted a continuance, and a third “firm” trial date was set for February 22, 2011.  
18 (Doc. No. 51-7 at 17.) On January 18, 2011, a discovery hearing was held before the  
19 Honorable Louis R. Hanoian and Lorandos’ request for a continuance of the trial date due  
20 to the large amount of discovery and the need for investigation was granted. (*Id.* at 23–24.)  
A fourth trial date was then set for September 27, 2011. (*Id.* at 23, 31.)

21 Later that year, on October 28, 2011, Pawlicki failed to appear at a status conference  
22 and a bench warrant was issued for his arrest. (*Id.* at 56–57.) In November, Pawlicki  
23 appeared in court following his extradition in Georgia and he was ordered held without bail  
24 after the prosecutor informed the court that Pawlicki had been apprehended by bounty  
25 hunters while he was attempting to obtain false identification and board a cargo ship to  
26 China. (*Id.* at 59; Doc. No. 51-21 at 6–7.) A sixth trial date was then set for January 9,  
27 2012. (*Id.* at 14.)  
28

1 On November 18, 2011, the court held a hearing on Lorandos' motion to withdraw.  
2 (Doc. No. 51-22 at 8–11.) However, the motion was never argued as Pawlicki fired  
3 Lorandos at the hearing and informed the court that he was in the process of retaining  
4 attorney Vikas Bajaj. (*Id.* at 3–4, 8.) The Office of the Public Defender was appointed  
5 pending the retention of Bajaj, who was never retained, and a status conference was then  
6 set to give Pawlicki time to retain counsel. (*Id.* at 12.)

7 On December 15, 2011, Dante Pride substituted in for the public defender and the  
8 January 9, 2012 trial date was converted into a status conference so that a “firm” trial date  
9 could be set. (Doc. No. 51-23 at 4–10.) A seventh trial date was then set for June 18, 2012,  
10 with the court informing Pride that no further continuances would be given. (Doc. No. 51-  
11 7 at 69; Doc. No. 51-8 at 26.)

12 On March 22, 2012, Pride moved to withdraw as counsel on the basis that Pawlicki's  
13 conduct had made it unreasonably difficult for him to proceed and that Pawlicki had  
14 breached his fee obligation with him. (Doc. No. 51-12 at 21.) Pride's motion was granted  
15 on April 2, 2012, and a public defender was appointed. (Doc. No. 51-8 at 26.) Thereafter,  
16 Attorney Mel Epley appeared for Pawlicki, but on May 4, 2012, the public defender's  
17 office conflicted out because they represented the jailhouse informants who eventually  
18 testified at trial that Pawlicki solicited them to destroy evidence and kill witnesses. (Doc.  
19 No. 51-7 at 75–76.)

20 On May 14, 2012, the trial date was vacated and an alternate public defender Zaki  
21 Zehawi was appointed. (*Id.* at 77.) As Zehawi indicated that he had not reviewed all the  
22 discovery, an eighth trial date was set for October 29, 2012. (*Id.* at 78.) Thereafter, two  
23 months before trial, retained attorney Raymundo Pacello appeared and requested to be  
24 substituted in for Zehawi. (Doc. No. 51-26 at 4.) Pacello indicated that he had met with  
25 Pawlicki multiple times, was familiar with the details of the case, was an experienced trial  
26 attorney with an “enormous staff,” and was “ready, willing and able to proceed” to trial as  
27 scheduled. (*Id.* at 14.) The court then questioned Pacello about the number of cases he had  
28 tried in terms of felony trials to a verdict and affirmed that he was familiar with the history

1 of the attorneys in the case and that Pawlicki wanted Pacello as his counsel. (*Id.* at 16–17.)

2 Four weeks before trial was set to begin, Pacello sought a 60-day continuance stating  
3 that despite having hired multiple people and having spent hundreds of hours preparing, it  
4 would be difficult for him to proceed to trial. (Doc. No. 51-34 at 5–36.) The motion was  
5 ultimately denied, though the trial date was continued for a week to accommodate the  
6 judge’s trial schedule. (*Id.* at 36, 51.)

7 Around two weeks before trial, attorney Pam Lacher moved to substitute in for  
8 Pacello and Pacello moved to withdraw as counsel of record. (Doc. No. 51-7 at 83–84.)  
9 Lacher informed the court that Pawlicki had contacted her five weeks earlier, but that she  
10 was not ready to go to trial and asked for a six-month continuance. (Doc. No. 51-35 at 10–  
11 46.) Pacello then informed the trial judge, in camera, apparently while crying, that his  
12 motion was based on the fact that he is a father to “two beautiful daughters” and that he  
13 could not “get up in front of [the] court and basically misstate what [he] believe[d] for the  
14 benefit of a defense of a man” whom he no longer trusted. (Doc. No. 58-3 at 5, 7.)  
15 Moreover, to further support his motion, Pacello stated that he was in charge of Pawlicki’s  
16 entire estate, that he was aware of “people doing all kinds of different things,” that he didn’t  
17 know what Pawlicki’s next move was, and that Pawlicki “fooled” him into believing he  
18 was innocent. (*Id.* at 7.)

19 After holding a hearing on both matters, the court denied Lacher’s motion to  
20 substitute into the case and denied Pacello’s motion to withdraw because the reasons he  
21 provided were more akin to personal issues and did not amount to a breakdown of the  
22 attorney-client relationship. (Doc. No. 51-35 at 46–49.) The trial judge then warned  
23 Pawlicki that he could fire Pacello, but then he would have to represent himself or retain  
24 someone who was ready to go to trial. (*Id.* at 47–48, 59.) Further, Pawlicki was cautioned  
25 that if his conduct of hiring and firing attorneys were to rise to the level of misconduct, he  
26 risked forfeiting his right to counsel under *King v. Superior Court*, 107 Cal. App. 4th 929,  
27 944–49 (2003). (*Id.* at 50–51.)

28 Jury selection began on November 8, 2012, with trial lasting fourteen court days.

1 (Doc. No. 51-7 at 96–130.) On December 10, 2012, after deliberating for two days, the jury  
2 found Pawlicki guilty of touching the breasts (count one) and vagina (count two) of his 12-  
3 year old stepdaughter Christina C. with his hand, forcing her to touch his penis with her  
4 hand (count three), and touching her vagina with his penis (count 4), touching the vagina  
5 of his 9-year old daughter Bonnie P. who suffers from Down Syndrome with his penis  
6 (count 6), and touching her crotch with his hand (count 8), and touching his penis to the  
7 anus of Michael S., his 11-year old stepson (count 7). (Doc. No. 51-8 at 9–22.) Pawlicki  
8 was found not guilty on count five, touching Bonnie P. with his hand in bed. (*Id.* at 18.)

9 On January 9, 2013, the date set for sentencing, Pawlicki fired Pacello and Lacher  
10 substituted in as retained counsel. (*Id.* at 23.) Lacher requested a six-month continuance in  
11 order to file a new trial motion, which was denied. (*Id.* at 24.) Thereafter, Lacher filed  
12 another motion for reconsideration of her request for a continuance, which was also denied.  
13 (*Id.* at 24–31.)

14 Lacher then filed a motion to disqualify the trial judge based on allegations that (1)  
15 she previously appeared in the trial judge’s court numerous times, but had never been  
16 treated the way she had in this case; (2) the trial judge had formed an opinion that Pawlicki  
17 had hired and fired attorneys as a ploy to delay the proceedings without an adequate inquiry  
18 into the reasons for substitution of counsel; (3) by denying Lacher’s pretrial motion for  
19 substitution of counsel, the trial judge forced Pawlicki to go to trial with Pacello—a  
20 conflicted, inexperienced, and unprepared attorney; and (4) the trial judge refused to give  
21 Lacher sufficient time to prepare a motion for new trial. (Doc. No. 51-5 at 162–291.) All  
22 of these matters led Lacher to believe that the judge had violated three canons of judicial  
23 ethics (integrity, impartiality, and competency) and had lost the ability to remain impartial.  
24 (*Id.*) On March 26, 2013, finding no basis for disqualification, the motion was denied.  
25 (Doc. No. 51-6 at 2–6.)

26 On March 29, 2013, Lacher filed a new trial motion alleging that: (1) Pacello had a  
27 conflict of interest; (2) Pacello was essentially absent from trial as he spent the majority of  
28 his time during trial sleeping or using his cellphone to update his Facebook page, check

1 emails, or read messages; (3) the trial court erred when it refused to relieve Pacello prior  
2 to trial; and (4) each of the foregoing resulted from a lack of impartiality of the trial judge.  
3 (*Id.* at 48–77.) The motion was denied on April 2, 2013. (Doc. No. 51-8 at 36–37.) Pawlicki  
4 then appealed. (Doc. No. 51-63.) The appellate court affirmed. (*Id.* at 43.) On March 16,  
5 2015, Pawlicki filed a petition for review in the California Supreme Court presenting a  
6 single claim: that he was denied his right to counsel under Cronic. (Doc. No. 51-64.) That  
7 petition was denied. (Doc. No. 51-65.) On June 3, 2016, Pawlicki filed a habeas petition in  
8 the Supreme Court of California, (Doc. No. 51-66), which was also denied, (Doc. No. 51-  
9 67).

## 10 II. LEGAL STANDARD

### 11 A. STANDARD OF REVIEW OF THE R&R

12 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district  
13 judge’s duties in connection with a magistrate judge’s R&R. The district judge must “make  
14 a de novo determination of those portions of the report . . . to which objection is made[,]”  
15 and “may accept, reject, or modify, in whole or in part, the findings or recommendations  
16 made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C); *see also United States v.*  
17 *Remsing*, 874 F.2d 614, 617 (9th Cir. 1989).

18 “The statute [§ 636(b)(1)(C)] makes it clear that the district judge must review the  
19 magistrate judge’s findings and recommendations de novo *if objection is made*, but not  
20 otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (emphasis  
21 in original). Hence, in the absence of objection(s), the court “need only satisfy itself that  
22 there is no clear error on the face of the record in order to accept the recommendation.”  
23 Fed. R. Civ. P. 72(b) advisory committee note to 1983. As to portions of the report to which  
24 no objection is made, the Court “may assume the correctness of the magistrate judge’s  
25 findings of fact and decide the motion on the applicable law.” *Johnson v. Nelson*, 142 F.  
26 Supp. 2d 1215, 1217 (S.D. Cal. 2001).

### 27 B. STANDARD OF REVIEW UNDER 28 U.S.C. § 2254

28 A petitioner in state custody pursuant to the judgment of a state court may challenge

his detention only on the grounds that his custody is in violation of the United States Constitution or the laws of the United States. 28 U.S.C. § 2254(a); *accord Williams v. Taylor*, 529 U.S. 362, 375 n.7 (2000). The Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) (codified as amended as 28 U.S.C. § 2254(d)), applies to § 2254 habeas corpus petitions filed after 1996. *See Lindh v. Murphy*, 521 U.S. 320, 322 (1997). Federal habeas relief is available only if the result reached by the state court on the merits is “contrary to” or “an unreasonable application” of Supreme Court precedent, or if the adjudication is “an unreasonable determination” based on the facts and evidence. 28 U.S.C. § 2254(d)(1)–(2). To be an unreasonable application of federal law, the state court decision must be more than incorrect or erroneous; it must be objectively unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

### III. DISCUSSION

Pawlicki’s second amended petition brings the following claims:

1. Pawlicki’s trial counsel was so ineffective it amounted to a complete denial of his right to counsel because Pacello: (a) misled Pawlicki and the trial judge regarding his experience; (b) failed to hire a second expert witness; (c) lacked experience with the rules of evidence; (d) failed to prepare for trial; (e) had a conflict of interest; and (f) failed to pay attention during trial because he was sleeping and using his cell phone.
2. The trial judge’s decision to refuse to permit Pawlicki to replace Pacello with Lacher prior to trial was based on actual or apparent judicial bias.
3. Prosecutorial misconduct occurred when: (a) the prosecutor presented irrelevant and inflammatory testimony; (b) the police seized the hard drive from Pawlicki’s computer without a warrant; and (c) the prosecutor withheld statements by Dr. Marilyn Kaufhold that Bonnie was never sexually abused, medical and criminal records purportedly demonstrating that Christina C. and Michael S. “were of bad character and should not be believed,” and “evidence that Christina C had recanted her allegations.”



1 4. Pawlicki is actually innocent.

2 5. To the extent the allegations of ineffective assistance of trial counsel in claim one  
3 did not rise to the level of complete denial of counsel under Cronic, they amount to  
4 ineffective assistance of trial counsel under Strickland.

5 6. Pawlicki was denied his right to his choice of counsel through the denial of his  
6 pretrial motion to substitute attorney Lacher for Pacello.

7 7. Pawlicki was denied his rights to due process and equal protection by the admission  
8 of uncharged sexual misconduct with minors, introduced for the sole purpose of  
9 showing he had a propensity to commit the charged crimes.

10 (*See generally* Doc. No. 34.)

11 A. PETITIONER IS NOT ENTITLED TO DE NOVO REVIEW BECAUSE HIS  
12 OBJECTION IS AN OPPOSITION

13 Rule 72(b)(2) requires an objecting party to file “specific written objections” and  
14 Rule 72(b)(3) requires the district judge to review decisions of the magistrate judge that  
15 have been “properly objected to.” Fed. R. Civ. P. 72(b)(2), (3). Specifically, though  
16 objections of pro se litigants are generally accorded leniency and “construed to raise the  
17 strongest arguments that they suggest[,]” these objections “must be specific and clearly  
18 aimed at particular findings in the magistrate’s proposal, such that no party be allowed a  
19 second bite at the apple by simply relitigating a prior argument.” *DiPilato v. 7-Eleven, Inc.*,  
20 662 F. Supp. 2d 333, 340 (S.D.N.Y. 2009) (citation and internal quotations omitted).

21 Presently, although Pawlicki filed a document entitled “Objection to Report and  
22 Recommendation,” the document does not contain specific objections. (*See generally* Doc.  
23 No. 61.) Rather, Pawlicki re-argues his belief that the trial judge engaged in outrageous  
24 conduct, the trial judge was unreasonable, that Pacello misled the court regarding his  
25 experience, that Pawlicki was found guilty on “mere accusations,” and that he was denied  
26 his choice of counsel. (*Id.*) Regrettably, all of these contentions are simply re-statements  
27 of the claims in the Petition. (*See generally* Doc. No. 34.)

28 The Court notes that it appreciates the time that Pawlicki took to craft his objection.

1 The Court is also cognizant that as a pro se litigant, the Court should give him considerable  
2 leeway. *See Hughes v. Rowe*, 449 U.S. 5, 9 & n.7 (1980) (explaining that pro se pleadings  
3 are held to “less stringent standards than formal pleadings drafted by lawyers” because pro  
4 se litigants are more prone to making errors in pleadings than litigants represented by  
5 counsel); *see also Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987) (noting that the  
6 Supreme Court has stated that federal courts should liberally construe the “‘inartful  
7 pleading’ of pro se litigants.”). This rule particularly applies to pro se prisoners. *See Zichko*  
8 *v. Idaho*, 247 F.3d 1015, 1020 (9th Cir. 2001).

9 However, pro se plaintiffs are still expected to follow “the same rules of procedure  
10 that govern other litigants.” *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), *overruled*  
11 *on other grounds by Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012); *see also*  
12 *Jourdan v. Jabe*, 951 F.2d 108, 109 (6th Cir. 1991) (“[W]hile pro se litigants may be  
13 entitled to some latitude when dealing with sophisticated legal issues, acknowledging their  
14 lack of formal training, there is no cause for extending this margin to straightforward  
15 procedural requirements that a layperson can comprehend as easily as a lawyer.”).

16 Thus, regrettably, as Pawlicki’s objection simply repeats the arguments made in his  
17 Petition—arguments already analyzed by the magistrate judge in the R&R—the Court is  
18 relieved of any obligation to review the objection. *See Thomas v. Arn*, 474 U.S. 140, 149  
19 (1985) (holding that § 636(b)(1)(C) “does not on its face require any review at all, by either  
20 the district court or the court of appeals, of any issue that is not the subject of an  
21 objection.”); *see also Sullivan v. Schriro*, No. CV-04-1517-PHX-DGC, 2006 WL 1516005,  
22 at \*2 (D. Ariz. May 30, 2006) (“Reformatting the petition as an objection provides this  
23 Court with no guidance as to what portions of the R&R Petitioner considers to be  
24 incorrect.”).

25 Nevertheless, the Court liberally construes and considers the discernable objections  
26 as presented by Pawlicki in his brief.

27 ***i. Ineffective Assistance of Counsel***

28 The core issue presented in Pawlicki’s objection is his claim of ineffective assistance

1 of his trial counsel. (Doc. No. 61 at 7–11.) Specifically, Pawlicki argues that Pacello  
2 supposedly lacked a basic understanding of the rules of evidence, that Pacello had a conflict  
3 of interest, and that Pacello was absent from trial as he spent the majority of the time  
4 sleeping. (*Id.* at 10–11.)

5 The Court does not deny that the record demonstrates that Pacello’s actions when  
6 requesting withdrawal from this case were peculiar. However, to adequately allege  
7 ineffective assistance of counsel, Pawlicki must show that his counsel’s deficient  
8 performance was prejudicial, which requires showing that his “counsel’s errors were so  
9 serious as to deprive [Pawlicki] of a fair trial[.]” *Strickland v. Washington*, 466 U.S. 668,  
10 687 (1984). A petitioner need only demonstrate a reasonable probability that the result of  
11 the proceeding would have been different absent the errors. *Id.* at 694. A reasonable  
12 probability is a “probability sufficient to undermine confidence in the outcome.” *Id.*

13 Applying this standard, though Pawlicki provides the Court with several arguments  
14 for why he believes Pacello’s representation was deficient, he has not identified any defects  
15 in the representation that would have altered or prejudiced the outcome of his jury trial. As  
16 the trial judge stated, the jury was entitled and did believe the testimony of Michael and  
17 Christina, two of Pawlicki’s victims, especially once they were corroborated by two other  
18 individuals. (Doc. No. 60 at 52–53.) Moreover, Pawlicki’s own statements during trial as  
19 well as his flight from prosecution, taken together, allowed for the inference of guilt.<sup>1</sup> (*Id.*)  
20 Thus, despite Pawlicki maintaining that he should be granted a new trial based on  
21 ineffective assistance of his trial counsel, his Petition as well as his objection fail to  
22 establish prejudice as a result of Pacello’s purported errors.

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23  
24 <sup>1</sup> The R&R puts into great detail various facts that highlight that even if Pacello was  
25 inexperienced or unprepared, there was more than enough evidence to support the  
26 conclusion that the outcome of trial would not be undermined by Pacello’s various  
27 purported inadequacies. (*See* Doc. No. 60 at 62 (highlighting that Pawlicki’s family and  
28 friends testified that he had admitted to sexually molesting Christina C, Pawlicki had a  
lifetime history of sexually inappropriate behavior, and that he had shown pornography to  
children and spoke to children about sex).)

1                    *ii. Actual Innocence*

2            Pawlicki argues that if his counsel had been effective at trial, it would have been  
3 more likely that he would have been found not guilty for the crimes he was charged with.  
4 (Doc. No. 61 at 17.) Pawlicki then claims that two of the witnesses for the prosecution  
5 admitted to making up the charges against him. (*Id.*)

6            To establish actual innocence, a petitioner must demonstrate that, “in light of all the  
7 evidence, it is more likely than not that no reasonable juror would have convicted him.”  
8 *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Schlup v. Delo*, 513 U.S. 298,  
9 327–28 (1995)). However, the United States Supreme Court has limited *Schlup* to  
10 petitioners who can show that a “constitutional violation has probably resulted in the  
11 conviction of one who is actually innocent.” *Schlup*, 513 U.S. at 327 (citation omitted).  
12 Thus, “a petitioner must show that, in light of all the evidence, including evidence not  
13 introduced at trial, ‘it is more likely than not that no reasonable juror would have found  
14 petitioner guilty beyond a reasonable doubt.’” *Majoy v. Roe*, 296 F.3d 770, 775–76 (9th  
15 Cir. 2002). “A petitioner need not show that he is ‘actually innocent’ of the crime he was  
16 convicted of committing; instead, he must show that ‘a court cannot have confidence in the  
17 outcome of the trial.’” *Id.* at 776.

18            Unfortunately, Pawlicki repeats his belief that he is factually innocent while outright  
19 ignoring the R&R’s findings. (*See* Doc. No. 60 at 83.) The statement Pawlicki references  
20 was made by Christina C. during a preliminary hearing where she said “No. We just made  
21 up this thing[.]” (Doc. No. 61 at 31.) However, this statement was made in response to the  
22 question: “You felt like people were telling you what to say, right?” (*Id.*)

23            As the R&R already illustrated, Pawlicki takes the foregoing testimony out of  
24 context. Instead, as the R&R delineates, it appears that Christina C. may have been  
25 indicating that she felt like her teachers as well as other individuals who were pressuring  
26 her to report the abuse may have thought that she was making up the allegations. (*Id.*; *See*  
27 Doc. No. 56 at 8.) The Court agrees with the R&R’s interpretation as well as finds that this  
28 statement falls far from constituting a clear admission that Christina made up the

1 allegations against Pawlicki. Accordingly, Pawlicki has not demonstrated his actual  
2 innocence.

3 In sum, the Court finds that as a whole, Pawlicki's various objections are simply  
4 broad and general re-statements of the arguments in his Petition. Moreover, the majority  
5 of the objections were already thoroughly and painstakingly addressed and analyzed in the  
6 R&R. Thus, without more, and even construing Pawlicki's objections liberally, the Court  
7 finds that Pawlicki has made no specific objections to the R&R and those objections the  
8 Court has addressed above do not demonstrate that Pawlicki is entitled to federal habeas  
9 relief. Accordingly, the Court **ADOPTS** the R&R in its entirety and **DENIES** the Petition.

#### 10 B. PETITIONER'S MOTION FOR LEAVE TO EXHAUST HIS CLAIMS

11 On December 14, 2017, Pawlicki filed a motion for a stay in regards to claims two,  
12 three, and five. (Doc. No. 63.) There, he requested that the Court stay its ruling until he  
13 could "fully exhaust claims this Court deems are unexhausted[,]" (*Id.* at 2), "[b]ecause this  
14 Court and the respondent agree that the three claims have not been properly addressed and  
15 exhausted . . . ," (*Id.* at 7).

16 Unfortunately, Pawlicki must be mistaken about the Court's position. In the R&R,  
17 Judge Dembin ruled in Pawlicki's favor and recommended that Respondent's contention  
18 that claims two, three, and five are procedurally defaulted be rejected. (Doc. No. 60 at 28.)  
19 Moreover, the R&R also recommended that this Court reject Respondent's assertion that  
20 any claim is unexhausted. (*Id.* at 28–31.) Instead, the R&R found that Pawlicki had  
21 "satisfied the exhaustion requirement by presenting claims one through six to the state  
22 supreme court in a manner which permitted that court to reach the merits of the claims."  
23 (*Id.* at 30.)

24 Thus, finding that Pawlicki must have misread or misconstrued the R&R, and most  
25 importantly highlighting that the R&R agrees with Pawlicki that his claims are in fact  
26 exhausted, the Court **DENIES** Pawlicki's motion for leave to exhaust claims **AS MOOT**.

#### 27 **IV. CONCLUSION**


28 As explained more fully above, the Court **ADOPTS** the R&R in its entirety, (Doc.

1 No. 60), **OVERRULES** Pawlicki's objections, (Doc. No. 61), **DISMISSES** Pawlicki's  
2 habeas petition, (Doc. No. 34), and **DENIES AS MOOT** Pawlicki's motion for leave to  
3 exhaust his claims, (Doc. No. 63).

4 When a district court enters a final order adverse to the applicant in a habeas corpus  
5 proceeding, it must either issue or deny a certificate of appealability, which is required to  
6 appeal a final order in a habeas corpus proceeding. 28 U.S.C. § 2253(c)(1)(A). A certificate  
7 of appealability is appropriate only where Pawlicki makes a "substantial showing of the  
8 denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 325 (2003) (quoting  
9 28 U.S.C. § 2253(c)(2)). Under this standard, Pawlicki must demonstrate that reasonable  
10 jurists could debate whether the petition should have been "resolved in a different manner  
11 or that the issues presented were adequate to deserve encouragement to proceed further."  
12 *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (citation and internal quotation marks  
13 omitted). Here, the Court finds that reasonable jurists could not debate the Court's  
14 conclusion to dismiss Pawlicki's habeas petition and therefore **DECLINES** to issue a  
15 certificate of appealability.

16  
17 **IT IS SO ORDERED.**

18  
19 Dated: July 2, 2018

20   
21 Hon. Anthony J. Battaglia  
22 United States District Judge  
23  
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